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ST. LOUIS, MO., JANUARY 19, 1912.

INTERSTATE COMMERCE ACT AS EMBRACING INTERURBAN ELECTRIC RAILWAYS.

The Commerce Court by a recent decision construes the interstate commerce act as embracing an electric interurban passenger street railway. The ruling was made in respect of regulation made by the Interstate Commerce Commission of a street railway line in Council Bluffs, Iowa, extending over a bridge across the Missouri river and around a loop covering several blocks in the business section of Omaha, Nebraska. Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission, 191 Fed. 40.

In considering whether this decision is correct, it is well to quote from a statement made by Senator Cullom, Chairman of the Senate Committee, when the original act was under consideration.

The Senator said: "The bill is not intended to affect the stage-coach, the street railway, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects."

One is impressed by this statement with the thought, that, if afterwards the stage-coach, the street railway, etc., should assume such importance as to appeal to Congress to extend interstate commerce legislation, it would do so, or that duty would remain unattended to. Certainly the constitution commits its performance to no other body. On the contrary, for anyone else to attempt to include any other agencies in interstate commerce than are embraced is the plainest usurpation of power.

The Commerce Court, however, reasons that: "A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted—any more than the Constitution—in accordance with the economic or physical conditions prevailing at the time of its adoption."

This statement is open to serious criticism. In the first place, it is begging the question to assert that the act was "designed to regulate the vast interstate transportation business of the country." It mentions particular instrumentalities in interstate commerce whose operations are by the act to be regulated. In the next place it emanates from a continuous legislative body ever ready to respond to the needs of interstate commerce, as it and not the courts shall interpret those needs. In the third place, merely regulatory legislation of that which belongs to the states among themselves, rather than to the nation as an agency of the states, calls for stricter interpretation than principles statutorily declared as rules of right between man and man.

Further, as against the statement we are criticising, we assert, that it has been stated over and over again in decision, that the state may impose all sorts of regulation upon common carriers engaged in interstate commerce where these are not covered by act of congress, thus implying plainly that states have such an interest in these things, that regulation by states must be specifically limited by Congress.

Let us then see whether or not the act bears out the observation of Senator Cullom as to its intent.

On its face it distinctly disclaims application to all common carriers. Thus it applies to "the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines," etc. Next, it applies to "transportation of passengers or property wholly by railroad or partly by railroad and partly by water,"

etc. Then it says the term, "common carrier," as used in the act, shall include express companies and sleeping car companies, and the term "railroad" shall include bridges and ferries.

We know then that stage-coaches, horse-cars, vessels, drays, wagon lines were not included and we rather believe that, if aeroplanes or balloons were transporting freight or passengers, or both, Congress would have to amend its regulatory legislation to embrace them.

If all this is true, then the only question is whether "railroad" means street railway. In common parlance they are not the same thing. They do not run over the same kind of ground. They are not subject to the same kind of regulation.

One is primarily an urban convenience and when so used it is no affair of Congress by what power it operates. When it extends outside of city limits it may incidentally affect interstate commerce. But, as we above indicated, all incidental effects which spring from local conditions, must be covered by act of congress, specifically.

We further think the court argues wrongly in comparing conditions in 1887, when the original act was passed, with conditions now existing. It refers to frequent amendment of the act since that time, and, if the language used was deemed still sufficient, courts have no duty in trying to stretch interpretation to embrace new conditions.

To regulate interstate commerce properly requires that every new condition shall invoke a new rule, and there is no competent authority for the new rule other than the creator of the old rule. Congress sits on the watchtower and is supposed to see everything that so interferes with the needs of interstate commerce that regulation by it ought to exclude state action. If there is serious obstruction to interstate commerce, Congress will interpose. Otherwise, it will ignore it; and courts should recognize its non-action, as well as its positive direction.

NOTES OF IMPORTANT DECISIONS

MINES AND MINERALS—OIL AND GAS LEASES CONSTRUED STRICTLY AGAINST LESSEE.—The Supreme Court of Oklahoma has handed down, through Judge Williams, a very elaborate opinion, concurred in by all the justices, in regard to the construction that should be applied to an oil or gas lease. Frank Oil Co. v. Belleview Gas & Oil Co., 119 Pac. 260.

The principal point of interest in this opinion is that where no possession is taken, but lessee acquires a right by payment in advance, renewable or continued by advance payments, the contract is rightly deemed an exploration option construed more strongly against lessee. This is true because in its nature the contract is unilateral and the fluidity of the mineral renders the value of lessor's property subject to depreciation by development of surrounding land.

Much authority is cited from Indiana, Ohio, West Virginia and Pennsylvania in aid of the just conclusion at which the court arrives. Using the term "rental" is held of no special significance in regard to such a contract, and the court says, after its evident investigation of many cases, that equitable relief has been granted in no case of such contracts "except where the lessee was in possession of the leased lands and making improvement."

The contract at bar provided, as is usual, for royalties to lessor in event of discovery of oil in paying quantities, and evidently it was in the minds of the lessor and tacitly agreed to by lessee, that the capability of the land for yielding royalties was to be of benefit to lessor. If, however, lessee could by lease of adjoining land detract from that capability and have it in his power to deprive lessor of all royalty, while incurring expense only in developing adjoining land, a most unjust result could ensue.

It occurs to us, in addition to what the court says, that lessors ought to have the right in case lessees have exploration rights in adjoining lands to refuse to extend options, where such lands are being developed, unless leases clearly forbid. The situation is changed by acts of lessee depreciating that which he has leased. Lessors in such leases are on the side of development of the resources of a state in dealing with those who presumptively pay earnest money for cooperation with him. The contract should not be upheld, when it both opposes this policy and causes pecuniary loss to its promoter.

EXECUTORS AND ADMINISTRATORS—EMPLOYER PAYING FUNERAL EXPENSES OF DECEDENT KILLED IN COURSE OF EMPLOYMENT.—Decision has gone to some length in holding that one providing for the funeral expenses of a decedent is not a mere interloper. The St. Louis Court of Appeals considered that where the relation of employer and employee existed and the employee was killed in the former's service, the exigencies of the case might prevent the employer being a mere interloper in contracting with an undertaker for his employee's suitable burial. Cape Girardeau Bell Telephone Co. v. Hamil, 140 S. W. 951. The theory of this ruling is that funeral expenses are more in the nature of a charge upon, than a debt against, a decedent's estate, and the law is concerned merely in the charge being proper in amount.

The court cites abundance of authority in support of its position, and it would certainly be a strange thing for scrutiny to be indulged in as to who had a legal status, as depending on family relationship or otherwise, to incur a debt that would be a charge on an estate, when it is contemplated that such charge shall be raised in advance of the estate having any legal representative. Officiousness seems to be the test of who may be a mere intermeddler and it may well be imagined that decision might be very rare. Judge Reynolds, speaking for the court, says: "We are unwilling, in a case of this kind, involving the right of sepulture, to hold that one connected with another, as was the employer here, taking upon himself, in the exigencies of the case, the act of decent burial, even without an express request of the relatives, or an express promise of the administrator to make him whole, cannot recover off of the estate of the decedent the amount he has properly expended. A mere intermeddler cannot recover. But an employer, under the facts here in evidence, is not an intermeddler." If this decision is not right in principle, it is difficult to see how any funeral charges might not be disputable as a charge upon an estate. No legally authorized person to provide for them is in existence when the expense is incurred, and even a will afterwards probated might designate a smaller expenditure, than would be deemed fairly reasonable. One's relatives, of course, would be expected to provide for proper burial, but, if they neglected, or were, for some reason, unable, to do this or, if decedent had no relatives and only acquaintances, would there not be an exigency preventing any one reasonably acting from being an intermeddler?

CONTINENTAL AND COMMON LAW PROCEDURE CONTRASTED—AN INTERESTING SIDE-LIGHT ON REFORM IN PLEADING AND PRACTICE.*

Continued from Last Week.

PART II.

Free Theory of Proof and Incriminatory Evidence.—We were all there on time.

Mr. White: "Does any of the gentlemen wish to ask Dr. Schwerin any questions before we proceed? None being heard, I shall ask you to continue, Doctor."

Dr. Schwerin: "Before proceeding further, I wish to make an explanation of one of my statements at our last session. I said then that we had no rules of evidence, and that everything was allowed to go in. Now Mr. Brown has asked me, whether this means that in cross-examination we are allowed to impeach a witness out of his own mouth and compel him to answer any questions, irrelevant to the case, but disclosing some disgraceful or questionable behavior of his at some time or other. I see the point, but did not think of it before, for reasons which I shall state hereafter. Any such questions as suggested can be asked, but it depends upon the witness whether he will answer or not; he is not bound to answer a question im-

*This article, pursuing the Socratic method of imparting truth, is interesting as suggesting many new lines of thought on the subject of the reform of our common law procedure from the standpoint of comparative jurisprudence. The author of this discussion, Mr. Axel Teisen, of Philadelphia, is a native of Denmark and a graduate of the University of Copenhagen as candidatus juris. He has consented to become one of our contributing editors and we therefore expect to be profited and entertained by further contributions from his pen. The peculiar method of this discussion was adopted so as to properly embody the views of many friends of the author as well as the views of some well-known continental jurists. For this reason, also, the author has considered the propriety of using the pseudonyn, "Advocatus Diaboli" instead of his own name. Since also, our common law procedure has been so frequently canonized by some of its friends, a critic so uncompromising as Mr. Teisen may well be compared to the advocatus diaboli appointed by the Roman Catholic Church to represent his Satanic Majesty to oppose the proposed canonization of a saint.

puting depravity in himself, if one of the parties, he may have to do it, if the matter in question is directly connected with the case at issue.

"You will notice that we do not exclude such evidence, if volunteered, we accept it. But we do not force witnesses to give it. Our standpoint is this: because a man has had the misfortune to disagree with some other man about some facts in connection with their transactions, or about the law governing them,. or because he has acquired some knowledge of facts about which other men are quarreling, is no reason why he should be compelled to lay his whole life open and possibly incriminate himself, and—I believe—that you look at it in the same way. So far as you call such a rule a rule of evidence, we have it; the only difference is that we would not call it so, but a rule governing the rights and duties of witnesses.

The Analogy of Civil and Criminal Litigation to War.—"Such a difference in the way of looking at and treating evidence as we referred to at our last meeting, must, of course, have a deeper ground than hitherto referred to. This ground I find in the way the object of a civil suit is looked upon. I have heard it expressed all over the states that law is war. This, to me, sounds very odd. The struggles of mankind from the dawn of time to this day, so it appears to me, seems mainly to have been concerned about how to make law supersede war. And now I am told, that law is war. And looking over the actual trials of cases which I have attended while here, I must confess that this idea probably is true so far as America is concerned; or if not war, then a sort of prize fight with the judge as referee, and may the best man win.

"You seem never to have become quite clear of the essential difference between civil and criminal cases. A criminal case is, and of necessity must be war, war between society on the one side and the accused on the other. Here you have a man accused of breaking the laws which society has promulgated for the sake of its own safety; he has been apprehended by the agents of this very society, who have put the stamp 'suspect' on him; he has been indicted by another body of men, also agents of society. He is then brought into court and there accused by a man, whom society has employed and pays for the purpose of convicting criminals, before a judge, who is supposed to be impartial, and generally is so, but who, nevertheless, owes his exalted position to society and is paid by it, and the question of his guilt is to be decided by twelve men, supposed to be of the accused's neighbors and peers, but who at the same time are living at peace with society and are bound up with it in all their material interests, and have been selected for their duty because they are safe men.

"When a man finds, not only his accuser but those who have to determine his guilt according to the facts and the law to be the agents of the very power whose laws he is supposed to have transgressed, he naturally cannot look to the machinery of the court before which he is tried with any absolute confidence, that justice will be done him; his accusers and judges are unconsciously prejudiced against him from the beginning. It is right and proper, therefore, yes, necessary, that the procedure by which such a man's case is tried and disposed of, should be hedged about with as many safeguards as possible, in order to protect those really innocent although apparently guilty, and it is the glory of glories of the English law and of the English people, that they never allowed the desire for protection of the public peace to lead them to adopt the inquisitorial instead of the accusatory principle of dealing with crimes and criminals; and while the details of your present system of criminal procedure, like all human matters, could without doubt be improved upon, especially so as to avoid some of the innumerable new trials and appeals, the principles are right and sound, and it is only fair that a man whose life or liberty and honor are at stake, with the interests of no single in-

dividual directly involved on the other side, should have the right to endeavor to keep the evidence against him out of the case.

"But when we come to civil cases, the situation is entirely different. Society as such is interested in fair dealing among its members, but indirectly only; interested, because cheating and overbearing behavior demoralize the whole body politic and lead to the breaking of the peace. We know that there was a time when this difference between civil and criminal cases was not apparent; when crimes and torts were all treated as torts and left to the prosecution of the injured, without the state taking any part in the prosecution except in so far as it stepped in and took its part of the fine. But to-day, when crimes and torts have become sharply defined and differentiated, the courts of civil and criminal jurisdiction rest, or ought to rest upon entirely different principles and foundations.

"The criminal court is an institution maintained by society in order to protect itself from direct attacks; the civil courts are established in order that there may be a place where the members of society can go and have their private disputes settled in an authoritative manner according to the law of the land. All courts are called courts of justice, but only civil courts can properly be called so; the criminal courts are courts of dicipline, of correction, and of justice only in so far as they try to avoid convicting and punishing innocent parties. But civil courts are, or ought to be courts of justice proper, their special object being to see that each man is protected in his rights, to help him against non-compliance therewith, and to protect him against violation thereof.

"The civil court is therefore eminently an instrument of peace, and as such is, or becomes a court of arbitration. Society is highly interested, that justice be done among its members; it knows from the experience of all mankind, that of their own initiative its members are not likely to do such justice; left to their own devices, the strong will oppress and use violence, the weak will cheat and use treachery. Therefore, it has for thousands of years tried, and now in the main succeeded, in taking the settlement of such disputes out of the hands of the disputants themselves, and transferring it to courts organized and established by itself.

"Society is not directly interested, whether John or George wins, but it is interested that the party, be he John or George, whose claim is in accordance with justice and the law of the land, shall be protected and not by force or fraud deprived of his legal rights.

"But if justice, substantial justice is the object of the civil courts, it follows that the procedure must be made as simple as possible, so that it does not become a game where the most tricky has the best chance to win..

"If this is the raison d'etre for civil tribunals, it follows that a civil trial is not war, but its negation. If a civil case is a peaceful arbitration and not a war measure, it follows again that you must leave to the parties the absolute right of disposition over their case, leave them to present it and prove it in their own way, reserving to the court, after the evidence has all been put before it, to decide whether it does prove what it was intended to do. If you do this you will within a short time be saved from almost all attempts to introduce irrelevant evidence, as stated before, and you will also be spared all attempts to prevent a party from introducing his evidence whatever it may be, and by this you will not only obtain a better chance of seeing substantial justice done, but you will also save a very large amount of time, now taken up by wrangles over the admissibility of evidence.

Only a Few Simple Rules of Evidence Necessary.—"There must, of course, always be some rules for the manner of introducing evidence, mainly amounting to this, that when you have once commenced you must, under all ordinary circumstances, continue until you have all the evidence in which you expect to produce, and cannot be allowed, later to introduce other evidence

which you might as well have produced in the first instance; this will not prevent the taking of evidence in *pepetuam rei memoriam,* or the introduction of later discovered evidence, under proper safeguards. But all your rules for laying a foundation for evidence may be discarded; it is left to yourself, and to your own logic and judgment in what order you desire to produce your evidence. You may, for instance, first show that your witness is competent, and then take his material testimony, or you may take this first and then show that he is competent to give it, or you may not bother with his competency at all, but leave it to the cross-examination to show that he is incompetent; the latter will most often be the course followed, and a deal of time thereby saved. Under this procedure also, the difference between the witnesses of the plaintiff and of the defendant will mainly disappear.

"Witnesses are subpoenaed to tell the truth under penalty of punishment for perjury, and not to tell a story favorable to either John or George. As I understand your system, if you call a witness subpoenaed by you, you must take his whole testimony as either true or false, and if you repudiate one part thereof, you thereby repudiate the whole of it; in the same manner, if you call the other side's witness for direct examination, you thereby accept his whole testimony as part of your own. In practice you will generally not call any witness of whom you do not know that his knowledge corroborates your claim, but if during the trial you find that a witness, of whom you did not know, has a correct knowledge of some part of the facts, even if as to other facts he may be in error, why should you not be entitled to his testimony as to these facts, without acknowledging his errors as true statements? The object of the court is, to get at the truth, and not to decide on points after so many successful feints.

"By making the witnesses the witnesses of the court, which subpoenaed them, you will also avoid a great deal of the now prevalent and necessary 'grooming' of witnesses, through which an enormous amount of conscious and unconscious perjury without doubt is committed."

Admission of Documentary Evidence Under Modern Civil Law Procedure.—Judge Black: "I realize, Doctor, that you are not speaking of the ultimate value of the evidence introduced, but only of the manner of and right to introduce it; but it is sometimes difficult to keep these two things apart, particularly for us who are in the habit of judging the evidence offered before its admission. Nevertheless, I should like, before you close your remarks upon rules of evidence, to hear your ideas about documentary evidence and its value. How do you prove them, and what effect do you give to them?"

Dr. Schwerin: "I take it, sir, that you refer more particularly to private documents and not to such public documents which prove themselves, or more correctly, which are proved beforehand by an official signature or seal, or both attached."

"As to private documents, or writings, I should distinguish between such as are set up in order to define certain rights and duties, and such as have no such purpose. Among the first must be reckoned all the ordinary documents proper, such as agreements, deeds, mortgages, bonds, notes, etc., and among the latter most letters, reports, bills, etc., but of course, a series of letters may form a contract and a bill may become evidence of such. The difference may also be stated this way: Certain writings claim to be evidence of an agreement; others only to show admissions. The first are intentional, the latter accidental evidence.

"From this difference follows a different treatment, and a different amount of weight given to them. But let me first mention the way of proving them. When required, it is the same as with you, but in many, and perhaps most cases, no proof is made, because no denial has been made. For instance, I sue on a note, and produce the note in court; if the signature and genuine-

ness of the note generally are not denied, I do not offer any proof as to these facts; unless denied, they are admitted. The same is the way with all other written evidence, and a goodly amount of time is saved thereby.

"Coming back to the various kinds of written evidence, let me say that accidental written evidence should be liberally interpreted, while strict interpretation should apply to intentional writings. These on their face show themselves to have been deliberately prepared by the parties to express their mutual agreements and intentions in the matter. At the same time, in my country we do not have any superstition about the particular sacredness or excellence of writing; we acknowledge that writing is a means of expression only, that every contract for its validity is dependent on the concurrent wills of the parties only. For this reason we will always allow a contract to be disproved as a correct expression of the real agreement between the parties.

"Another thing is that such evidence must show, not only that the party offering it had a different understanding of its meaning, but that the same was the case with the other side. For this reason, we do not hesitate to allow evidence to show that the written contract does not express the whole agreement entered into at the time, while we, of course, accept the prima facie presumption that the contract expresses what it was meant to express, and are strict in our requirements of evidence for the correction of the contract. For what does a written instrument directly show? Nothing beyond that these letters and words have been written on a certain piece of paper, and that the parties have set their names to it. All of the other force given to a written document, is derived from conclusions as to what the purpose of the parties was in having such a writing set up, and as to how they must have understood it when they signed their names to it. But we all know that the majority of people do not understand legal phraseology, that many of them are very deficient in ability to explain to a scrivener their real purpose and agreement, and that a great many scriveners are careless, and some inexcusably ignorant.

"Our general system of procedure, or rather the one that I have here outlined (for it is not identical with the system of the German code of civil procedure) is so different from yours, that I could go on indefinitely pointing out differences and details wherein, in my opinion, your system might be improved; but in a discussion like this, it would not only be useless to dwell upon anything but general principles, but I should be even more liable to make mistakes on account of my insufficient knowledge of your social conditions.

"Before I close, I wish however to be permitted to say this: I have the greatest admiration for your system of civil procedure as a complete structure, for the tremendous amount of learning, keenness of thought and ingenuity collected therein; also for the invaluable services that system has, in times past, given to the Ango-Saxon race and indirectly to all mankind. But my admiration is rather of an architectural nature, if I may use the expression.

"Some of you, and perhaps all, have probably been through the so-called chateaux-country of central France, and agree with me, not only in admiring the external beauty and symmetry of these chateaux but also how excellently most of them are placed and constructed for the purposes which they were to serve when erected. But you will again agree with me, when I say that none of these same exquisite chateaux are fit to live in for modern man, until they have been entirely reconstructed inside. The better a thing is done in the beginning, the better chance it has to survive for a long time, and if very excellently done, it even has a chance to survive its own usefulness. This, I am afraid, is what has happened to your system of civil procedure.

"One thing more. I may have said things which you might construe as a re-

flection upon the American Bar, its sincerity and uprightness. Nothing has been farther from my mind. I realize fully that the conditions under which we work are bound to influence our views, and as we work under entirely different systems, we are bound to take different positions as to our professional duties and conduct."

Mr. White: "I believe that some day, Dr. Schwerin, we shall reach the stage of the free theory of proof; the known history of the laws of all peoples show that the beginning is at the absolutely lawbound form of evidence, and that the evolution has everywhere been away therefrom and in the direction of the free theory. But I do not believe that we are ready to take the last step for awhile yet; we do not need it as much as our friends on the continent. There is with us a better understanding among the common people of the general principles of law, and of the ordinary tricks whereby they are sought to be defeated, than can possibly be the case on the continent. With us the common people have for generations taken an active part in the administration of justice, while on the continent nothing like juries in civil cases has been known for the last two hundred years or more. At the same time, I can readily see that if we adopted the free theory of proof, we should likely save considerable time, not only at the trials, but also by the elimination of a great many motions for new trials, arguments thereon, and appeals founded upon technical points."

Judge Black: "I wish to join to the fullest degree in what Mr. White said about our appreciation of Dr. Schwerin's kindness and sacrifice in setting forth to us some of the conclusions he has reached in his study of our systems of civil procedure, and I will add that they have interested me very much, and that I have learned a great deal about continental ways of looking at things legal, which until then I did not know.

"As to the substance of what the doctor said, I believe as I stated at a former meeting, that the doctor's scheme for commencing actions and disposing of preliminary motions would be an improvement upon the one now in force with us, but whether it would be the best, I am not prepared to say.

"As to the actual principles which are the base of our present system, however, namely our rules of evidence, I cannot follow the doctor at all. In this respect I am, as friend White said, a conservative of the conservatives. Expedition in the disposal of legal disputes is desirable, but much more desirable it is that the decision, when reached, shall be right and stable. Our rules of evidence had their origin in the minds of the greatest legal luminaries who ever sat upon the English Bench, men of the greatest wisdom and general culture, with a knowledge of life and of men not since surpassed; they evolved these rules, not sitting speculating in their studies, but while engaged in the trials of actual cases, having before them all sorts of evidence from which they must make their choice, what to believe and what not to believe. The general rules about the admission of evidence they founded, not upon abstract speculations, but upon actual experiences in life, and these rules in their main features hold good to this day, I believe. The so-called free theory of proof, I hold, may be a sign of evolution, but in its decaying stage, a sign not of advance but of degeneration. And I feel confident that a nation as vigorous as the German shall yet see its error and come to adopt at least the main features of our rules of evidence. But however, that may be, our rules of evidence are so intimately bound up with our system of jury trials in civil cases, and are the only safe rules where such trials exist, that as long as we have trial by jury in cases at law, the rules of evidence will survive, and the right of trial by jury in civil cases the Ango-Saxon peoples will never give up.

"A radical means a man who yearns to see justice done, and who will labor for justice with his best efforts without being deterred by regard for his selfish interests or timidity as to what may have to be dis-

carded, without any superstition as to the sacredness of rights vested upon iniquity. But I am not a revolutionary. While I do not compromise on my ideals and opinions as to what is right and just, I know that all human advance has to be made through the instrumentality of man, and that he can be changed and improved but very slowly and gradually.

"But the proper condition for a radical change in our system of civil procedure now exists, I believe. The law's delays have become stench in the nostrils of the great majority of Americans. A change must come, and will come soon. When it does come, it is of the greatest importance that it shall not be a mere patchwork, but a reform radical and comprehensive enough not only to answer the most pressing present demands, but to absorb and fit into such future requirements as may be reasonably foreseen and anticipated.

"I have listened to Dr. Schwerin with the greatest pleasure and interest, and I should be willing to abolish our rules of evidence to-morrow, if not to-day; and—in short while we should all be wondering how we ever could have borne with a condition, where we had to spend the best part of our mind and energy upon a lot of barren and useless technicalities.

"In this respect I would call Judge Black's attention to the fact, that the free theory has nothing to do with the intrinsic credibility of evidence, but with the right to produce it for whatever it may be worth. Most of our rules would stand as to that, but the evidence would not be prejudged, before it was heard.

"Before I close, allow me to cite from Buckle's History of Civilization in England, second volume, page 531, where he tells the following story:

"'When, in the year 1760, some bold men in the government proposed that the streets of Madrid should be cleansed, so daring a suggestion exited general anger. Not only the vulgar, but even those who were called educated, were loud in their censure. The medical profession, as the guardians of the public health, were desired by the government, to give their opinion. This, they had no difficulty in doing. They had no doubt that the dirt ought to remain. To remove it, was a new experiment; and of new experiments, it was impossible to foresee the issue. Their fathers having lived in the midst of it, why should not they do the same? Their fathers were wise men, and must have had good reasons for their conduct. Even the smell, of which some persons complained, was most likely wholesome. For, the air being piercing, it was extremely probable that bad smell made the atmosphere heavy, and in that way deprived it of some of its injurious properties. The physicians of Madrid, were, therefore, of the opinion that matters had better remain as their ancestors had left them, and that no attempts should be made to purify the capital by removing the filth which lay scattered on every side.'

"This happened in Spain, and not in England but it happened at a time when some of 'the greatest legal luminaries' were sitting on the English Bench, evolving their theories. *Mutatis mutandis,* the same thing happens to-day, and will continue to happen."

Dr. Schwerin: "With Mr. White's permission. I have said so much that I hate to say any more. Just a few remarks to put myself straight. I gave my lecture, as Mr. White called it, because you asked me to, and not because I had any conceited presumption of wishing to reform your form of procedure. You are yourselves in the throes preceding the birth of such reform. If what I have said shall only become a matter of thought among you, and not be discarded at once as something altogether impracticable and useless, I shall feel perfectly satisfied. I cannot help feeling that I shall then have given my mite towards the evolution of that better system of procedure for which you are now laboring and striving."

Mr. White: "Has Advocatus Diaboli anything he wishes to say?"

Advocatus Diaboli: "Only this, that I have taken shorthand notes of what has been said here. When transcribed, I shall submit them to you gentlemen, and if there are no very serious objections, I shall sometime publish the discussions."

ADVOCATUS DIABOLI,
(Mr. Axel Teisen).

Philadelphia, Pa.

LIBEL AND SLANDER—EVIDENCE.

RUSKIN v. ARMN.

Supreme Court of New Jersey, Nov. 6, 1911.

81 Atl. 342.

(Syllabus by the Court.)

In an action of libel, when the defendant files a plea of justification and afterwards withdraws such plea, by leave of the court, plaintiff is nevertheless entitled to put such plea in evidence as bearing on the question of malice.

PARKER, J.: This is an action of libel. The plaintiff had a verdict for six cents, and sues out this writ of error. There are 27 specific assignments of error, but with one exception we find no harmful error in the case. This error, however, will require a reversal of the judgment and a venire de novo.

The suit was based on a petition, signed by some 40 persons, which was addressed to the Newark excise board and protested against the granting of a liquor license to plaintiff on two grounds: First, that there were already enough saloons in the particular locality; and, secondly, that plaintiff was not of good reputation and had conducted a saloon previously in an illegal manner. This second ground was, of course, the part charged as libelous. The defendant did not sign the petition, but he circulated it and obtained signatures and was instrumental in presenting it to the excise board. Some 20 signers were joined with him as defendants, but as to them there was a discontinuance at the trial.

Defendant pleaded: First, the general issue; secondly, that the statements, etc., in the petition presented to the board, etc., "are true"; thirdly, that the communication was privileged. At the opening of the trial, defendant's counsel asked leave to strike out the "plea of justification," evidently meaning the second plea. This was opposed on the ground that plaintiff had prepared to rebut it, and had been holding a number of witnesses for that purpose. The court allowed the withdrawal of the plea on payment of costs, and added that the "question * * * whether plaintiff is entitled to claim any damages against these defendants for putting on the record a plea of that character and then not following it up, I need not decide now." Toward the end of plaintiff's case in chief, however, the question came up in this way: Plaintiff's counsel offered in evidence the second plea, and asked leave to read it to the jury. This was objected to and argument had, and the court overruled the offer and refused to let the plea be read. This was excepted to and error duly assigned; and this was the judicial action which in our view was erroneous and prejudicial to the plaintiff, and requires a reversal of the judgment.

No exception was taken to the action of the trial judge in permitting the withdrawal of the plea; and indeed it was unexceptionable. Van Pelt v. Whitlock, 5 N. J. Law, 810. But the judge took the ground in excluding the plea when offered in evidence that its withdrawal as a part of the record removed it from the case for all purposes; and this in spite of the facts that it had been placed on the record by defendant and allowed there to remain as a substantial reiteration of the alleged libel until after the jury was sworn and until after plaintiff's counsel had in the course of preparation for the trial subpoenaed a large number of witnesses and presumably communicated to them the contents of the plea that they were to be called to contradict by their testimony.

The rule, as we understand it, is that a plea of justification, unsupported by proof, may be considered by the jury as an aggravating circumstance in assessing the damages, 25 Cyc. 416; 18 Encyc. Law (2d Ed.) 1104; Townshend, L. & S. § 400; Odgers, L. & S. § 311; 1 Chitty, Pl. (12th Am. Ed.) 509; Fodor v. Fuchs, 79 N. J. Law, 529, 532, 76 Atl. 1081.

In Mocre v. Beck, 71 N. J. Law, 8, 58 Atl. 166, this court held that, when evidence was produced in support of a plea of justification, the fact that it "failed to convince the jury of the truth of the alleged slanderous words afforded no ground for holding as matter of law that the plea was filed in bad faith, or that the words were spoken with a malicious motive, and therefore justified the jury in awarding exemplary damages." But this does not reach the question under consideration,

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which is whether the jury were entitled to consider the reiteration of the accusation in judging of the question of malice.

There are authorities which hold that, if a plea of justification be withdrawn, it is out of the case for all purposes, and the jury are not entitled to consider it in aggravation of damages. Gilmore v. Borders, 2 How. (Miss.) 824; Shirley v. Keathey, 4 Cold. (Tenn.) 29. We find difficulty in adopting the reasoning of decisions which hold that a defendant may go on record as reiterating a libel, and escape all responsibility by withdrawing it at the last moment. In Warwick v. Foulks, 12 M. & W. 507, an action for false imprisonment, there was a plea of justification that plaintiff had committed a felony; but the plea was abandoned at the trial. The jury were instructed that the putting of such a plea on record was a persisting in the charge and was to be considered by them in assessing damages; and this instruction was upheld.

To the same effect is Smith v. Compton, 67 N. J. Law, 548, 52 Atl. 386, 58 L. R. A. 480, decided by the Court of Errors and Appeals. In that case, which was a suit for breach of promise, the defendant, in response to a demand for a specification of defenses under section 116 (now 104) of the practice act (P. L. 1903, p. 567), served notice that he proposed to show, among other things, that he had lawfully rescinded the contract because of discovering that plaintiff was not of good moral character. This notice was not filed before the opening of the trial, and at about that time defendant's counsel informed the plaintiff's counsel that the particular specification would not be relied on. Plaintiff's counsel was nevertheless permitted to offer it in evidence in aggravation of damages; and this was sustained by the court of review on the theory that the specification had a tendency to humiliate plaintiff in the estimation of her counsel and made it necessary to inform her witnesses that her character would be attacked—a precise parallel to the present case, and stronger, in that the paper in question was not a court record open to the world, but a mere notice as between the parties, so far as related to any act of defendant or his counsel.

We think it is clear that the placing on record of the second plea reiterating the truth of the charges contained in the petition was a fact that the plaintiff was entitled to place before the jury as evidence of malice. The fact that it was withdrawn by leave of court does not help the defendant. All that that withdrawal accomplished was to modify the record on which the case was to be tried, by depriving the defendant of any right previously existing by virtue of this plea of putting in evidence the truth of the statements of the petition. The effect would have been practically the same had defendant simply announced that he would offer no evidence in support of the second plea, and plaintiff dismissed his witnesses. In either case the fact would remain for the consideration of the jury that defendant had formally, in writing, and of record, reiterated a statement which by his withdrawal of it at the trial he conceded to be false.

It is urged for defendant that the plea was invalid in form as a plea of justification, in that it simply alleges generally the truth of the charges, without stating specific facts; and no doubt this is true. 1 Chitty, Pl. 494; Fodor v. Fuchs, 77 N. J. Law, 92, 71 Atl. 108. But we fail to see that the question of the legal sufficiency or otherwise of the plea as a pleading has any relation to the libelous character of the statement it contained.

We conclude, then, that the trial court should have permitted the plea that was withdrawn to be put in evidence and read to the jury, and that injurious error resulted from its exclusion.

This disposes of the only assignment of error requiring a reversal. We find no other injurious error either in the charge or in the course of the trial that is properly brought up for review.

The judgment will be reversed to the end that a venire de novo issue.

NOTE.—*Withdrawal of Plea of Justification as Excluding it from Evidence.*—The principal case goes upon the theory that attempt to justify a slander or libel should be in good faith or it shows malice, and anything to show a disposition in respect to it may be considered by the jury as or not tending to prove malice. We cite what we have found of authority on this subject.

In Spencer v. McMasters, 16 Ill. 405, the question was whether or not there was error in refusing to allow defendant to withdraw his plea of justification and it was held that such a plea together with all the circumstances attending its use by defendant being proper for consideration by the jury, upon the question of malice and the damages, plaintiff could object to its withdrawal. It was said: "The defendant, in this case, filed a plea, averring the truth of the slanderous charges contained in the plaintiff's declaration, filed his affidavit, averring the truth of his plea, and obtained a continuance of the cause. He made no attempt, on the trial, to make good his pretended justification; and, indeed, it would be difficult from the nature of his charges to believe he expected to prove them. His plea had done all the harm it was, perhaps intended to accomplish, and then de-

fendant moved for leave to withdraw it from the files thereby depriving the plaintiffs from using it as they had a right to do before the jury."

The intimation here is that had plaintiff not objected, the plea would have been effectually removed from all consideration by the jury.

In a prior case referred to by the last-mentioned case, there was no attempted withdrawal of the plea of justification but evidence was introduced to sustain it. It was held the court erred in its instruction that a failure to sustain it *must* be considered as aggravating the slander. The court said the jury was thus left without discretion when the slander may have been uttered in good faith. "The case was not one in which the attempt to justify could be regarded as a ground for enhancing damages. The attempt was evidently made in good faith, for proof was introduced tending to sustain the plea."

In the same volume in which the Spencer case, *supra*, is found a case where was filed with a plea of not guilty a notice of justification. This was read at length in the opening of the case by counsel for defendant. The court gave an instruction that the filing of the notice, causing counsel to read it publicly to the jury and in the hearing of the audience present and then abandoning it and not giving or attempting to give any evidence under it and after the close of plaintiff's evidence, withdrawing it, "may be considered as aggravation and evidence of malice and is a circumstance which, if they find defendant guilty, the jury have a right to take into consideration in aggravation of damages." This was held a proper instruction. "Nor did the fact that the notice was withdrawn render the instruction improper. It had been read in the hearing of the jury and bystanders and the striking it from the record did not destroy the effect it may have produced, or relieve the defendant from republishing the charge. If the use made of the notice was a causeless or wanton repetition of the slander, the jury were justified in giving greater damages, notwithstanding the defendant may have withdrawn it by leave of the court. The cases of Clinton v. Mitchell, 3 Johnson 144, and Sent v. Butler, 3 Cowen 370, do not hold a different doctrine. They only go to show that the court erred in allowing the notice to be withdrawn." This case takes away the intimation to which we referred above. Beasely v. Meigs, 16 Ill. 139. Both of the above cases are approved in Stowell v. Beagle, 78 Ill. l. c. 528.

In Shirley v. Keathey, *supra*, it was said: "The action of the court in admitting the plea (of justification) as evidence, after it was formally withdrawn, is assigned as error. How this would be, were the plea a good one, under the peculiar facts of this case, we need not determine; but it is very clear this plea can be looked to for no purpose; it is utterly invalid, insufficient and frivolous, and can neither be looked to in aggravation of damages, or as corroborating the testimony of impeached witnesses." Then the opinion goes on to show that under the code such a plea can be stricken by the court of its own motion. This ruling, therefore, whether supported by satisfactory argument or not, is special and the intimation rather supports than opposes the principal case.

Broden v. Walker, 8 Humph. (Tenn.) 34, referred to by next preceding case, was where the plea was replied to and remained in the case. The court charged that its filing could be taken as aggravating damages. The higher court ruled that the plea was so insufficient it would form no basis for such damages. It is difficult to appreciate this reasoning and we think it is well answered by what is said in the principal case.

A somewhat diligent search reveals little authority on this question and the only cases in opposition beside what is cited by the principal case are two from California which now follow.

In Morris v. Lachman, 68 Cal. 109, 8 Pac. 799, there was a judgment for defendant. It was said in the opinion: "The defendant had a right to withdraw the charge made against the plaintiff's reputation in his first answer, and by the court's permission to file an amended pleading, leaving the objectionable matter out. And no error was committed by that tribunal in refusing to allow proof to be made that such a charge had been thus preferred on a previous trial and attempted to be established by evidence." This case cites no authority for thus holding, but it certainly seems an extreme ruling. Its effect is that defendant endeavored all he could to establish his imputation and only abandoned this when he had utterly failed. The jury, as was ruled, had no right to take his conduct into consideration on a second trial, when this was proper on the former trial.

Stern v. Loewenthal, 77 Cal. 340, follows the Morris case, but one judge dissents and neither of them gives a very hearty assent to it as authority. There is cited Gilmore v. Bowers, *supra*. This case is very scant and cites no authority in its support. It shows that issue was taken on the pleas of justification to the different counts and before the cause was submitted to the jury the defendant asked and obtained leave to and did actually withdraw these pleas. On the trial, plaintiff, over objection by defendant, introduced them in evidence. The court said: "After the pleas were withdrawn, they were no longer before the court. Before that they were not a part of the record and defendant by their withdrawal placed them under his own control. It was improper, therefore, to permit them to be read as evidence. They were not, in fact, pleas in the cause, after they were withdrawn, and the plaintiff could exercise no control over them. By the withdrawal they were removed from the cause and were no longer a part of the proceedings. It stood on the general issue alone. And the plaintiff was bound to establish the charge by proper evidence."

It seems from this opinion that the question before the court was as to the admissibility of these pleas as shifting the burden of proof and not as matter for consideration by the jury as enhancing damages, that is to say, as evidence of malice. In this aspect the case was little in the way of support for the California case.

It is seen from these cases that they proceed upon a technicality, while the principal case and the Illinois cases regard the filing of such a plea from the standpoint of evidence relating to conduct. The California ruling is a strong illustration of the injustice of a contrary view. C.

CORAM NON JUDICE.

REFERENDUM AND RECALL.

The following letter from Gov. Woodrow Wilson of New Jersey to Prof. R. H. Dabney of the University of Virginia, is published in The Richmond Times Dispatch:

My Dear Heath: We did not have a chance when I was with you to have our talk out about the initiative, referendum and recall. It may be worth while, therefore, in view of the importance of the subject, for me to summarize somewhat more formally what I said to you in scraps.

In the first place, with regard to my own state of mind. I surrendered to the facts, as every candid man must. My whole prepossession—my whole reasoning—was against these things. But when I came into contact with candid, honest, public-spirited men who could speak (with regard, for example, to Oregon) from personal observation and experience, they floored me flat with their narration of what had actually happened. I found in the men who had advocated these things, who had put them into operation, and who had accomplished things by them, not critics or opponents of representative government, but men who were eager to restore it where it had been taken—these means to recover for the people what they had unquestionably lost—control of their own affairs.

In short, they were not trying to change our institutions. The initiative, referendum and recall were in their eyes (as they are in mine) merely a means to an end—that end being the restoration of the control of public opinion. Where opinion already controls, where there is now actual, genuine representative government, as I believe there is in Virginia and in the South in general, they are not necessary. Each state must judge for itself. I do not see how it could be made a subject of national policy. The people will, in my opinion, demand these measures only where they are manifestly necessary to take legislation and the control of administrative action away from special, hopelessly entrenched interests. They are no general or universal panaceas!

The recall of judges I am absolutely against, and always have been. It is a remedy for a symptom, not for a disease—the disease being the control of the system by influences which general opinion has ceased to control.

It interested me very much to find that even in Oregon literally no one thought of these new methods of action as a substitute for representative institutions, but only as a means of stimulation and control. They are as devoted to the idea of our representative institutions as we are—and are bent upon realizing these ideas in practice. That is their conscious object.

As for the recall, it is seldom used outside the municipalities. I do not remember an instance of its use on a state officer. It is merely "a gun behind the door."

Faithfully yours,
WOODROW WILSON.

BOOK REVIEWS.

THE LAW OF CONTRACTS.

This work in one volume is by Professor Clarence D. Ashley, Dean of the Faculty of Law in New York University. It is a volume of less than three hundred pages of text. The purpose is said not "to prepare a text solely for the use of students, but rather to aid the efforts being made to place the law on a more philosophic and satisfactory basis." Therefore the work is somewhat discursive with reliance more on selected cases than exhaustive of decided cases.

The author's propositions are clearly stated and the notes with authorities are often advantageously extended. The author very frequently gives the reader the benefit of his personal preference in view where there is conflict in decision.

The volume is in attractive form, with binding of law buckram and published by Little, Brown & Company, Boston, 1911.

BOOKS RECEIVED.

Reflections of a Lawyer. By Morris Salem, of the New York Bar. Published by the author. Review will follow.

HUMOR OF THE LAW.

THAT SETTLED IT.

A man who was not wise to the ways of the world was the father of a bright boy. He spent much time debating how the lad's future was to be shaped, and finally went for advice to the village sage, who at one time had been a part of the selfish, striving world, and who left it scarred and shaken, but full of wisdom. And the sage told the perplexed father how to determine his son's future, and the father straightaway went and did as he was advised. But the next day he sought out the sage in sore perplexity.

"The whole plan went wrong," said he, "and I am in a quandary what to do next."

"What did I advise you to do?" asked the wise man.

"You told me to leave George in a room with a work on theology, an apple, and some small change; that if when I returned I found him reading the book, he was to be made a clergyman; if eating the apple, a farmer; if interested in the money, a banker."

"Well?"

"But when I came back he was seated on the book with the half-devoured apple in his hand and the money in his pocket."

"That settles it," said the sage; "the lad is a born lawyer."

State's Attorney (to prospective juror)—Have you formed any opinion on this case?

Mr. Henpeck—No, sir. I don't think my wife has read anything about it yet.—Danville (Ind.) Republican.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Bankruptcy**—Exemption.—A judgment entered against bankrupt pending bankruptcy proceedings held a valid lien on real property of the bankrupt, which by reason of homestead exemption did not pass to bankrupt estate.—Gregory v. Cale, Minn., 133 N. W. 75.

2——Jurisdiction.—The pending of an involuntary proceeding in bankruptcy does not deprive the court of the right to make the adjudication on a subsequent voluntary petition, and it should do so where it appears to be for the best interests of the estate.—In re New Chattanooga Hardware Co., D. C., 190 Fed. 241.

3——Referees.—Where an order of a referee requiring a bankrupt to turn over property to his trustee was based on a mistake of fact, he has power, on petition of the bankrupt, filed within the time limited for review of his decision, and the mistake being shown, to reconsider and set aside such order.—In re Brenner, D. C., 190 Fed. 209.

4——Rights of Creditors.—Any fraud of a bankrupt in assigning an interest in an estate before bankruptcy and in taking a reassignment afterwards is available only to his creditors.—Van Heusen v. Van.. Heusen Charles Co., 131 N. Y. Sup. 401.

5. **Banks And Banking**—Notice.—Where the cashier of a bank pledged notes with such bank as collateral security for his own indebtedness, the bank is not chargeable with his knowledge of any infirmity in such notes—Melton v. Pensacola Bank & Trust Co., C. C. A., 190 Fed. 126.

6. **Brokers**—Commission.—One who has agreed in writing to pay another a commission for securing a buyer for his land cannot escape payment because he conveyed the land before the commission was earned.—Payne v. Twitchell, N. J. 81 Atl. 350.

7. **Burglary**—Reasonable Doubt.—Defendant, in a prosecution for burglary, cannot be convicted where there is a reasonable doubt at to whether he had the consent of the owner named in the indictment, or of his wife.—McKinney v. State, Tex., 140 S. W. 244.

8. **Cancellation of Instruments**—Fraud.—In an action to rescind a contract obtained by fraud, it is no defense that the exact manner of perpetrating the fraud is not shown, where the fraud itself is proved.—Green v. Security Mut. Life Ins. Co., Mo., 140 S. W. 325.

9. **Carriers of Goods**—Burden of Proof.—The carriers held to have the burden of proving the loss of goods in transit arose from the act of the shipper, though he accompanied them.—St. Louis, I. M. & S. R. Co., v. Pape, Ark., 140 N. W. 265.

10.——Discrimination.—The Missouri statute against discrimination held not applicable to a suit to compel a union depot company to permit a transfer company to maintain a booth and solicit business in its depot, a large part of which was interstate.—Depot Carriage & Baggage Co. v. Kansas City Terminal Ry. Co,, C. C.. 190 Fed. 212.

11. **Charities**—Law of Domicile.—The validity of a bequest to a religious object in a foreign will must be determined according to the law of the place of testatrix's domicile—United States Trust Co. of New York v. Wood. 131 N. Y. Sup. 427.

12. **Commerce**—Constitutional Law.—Congress had power under the commerce clause to require, as under Safety Appliance Act, that locomotives and cars used in interstate commerce be equipped with certain designated appliances, whether the vehicles are used in interstate or intrastate commerce.—Southern Ry. C., v. United States, 32 Sup. Ct., 2.

13. **Compromise and Settlement**—Failure to Perform.—Breach by a master of condition of a settlement for an injury to a servant remits the servant to his original rights.—Russ v. Harper, N. C., 72 S. E. 570.

14. **Constitutional Law**—Implied Power.—That which is necessary to make effective any provision of the Constitution will be implied as a part thereof.—Fraser v. Brown, N. Y., 96 N. E. 365.

15.——Implication.—Statutes contravening provisions necessarily implied from the Constitution are equally void with statutes contravening its express provisions.—Hopper v. Britt, N. Y., 96 N. E. 371.

16.——Legislative Power.—In the absence of constitutional inhibitions, the state Legislature may exercise the whole legislative power of the

people.—People ex rel. Hon Yost v. Becker, N. Y., 96 N. E. 381.

17. **Contempt**—Verbal Commitment.—Persons could not be imprisoned for contempt by the district court upon an oral order and without the issuance of a writ of commitment.—Ex parte Ogden, Tex., 140 S. W. 345.

18. **Contracts**—Estoppel.—Recitals in a contract, which are certain in their terms and with reference to which the contract was made estop the parties to deny the facts recited.—City of Minneapolis v. Minneapolis St. Ry. Co., Minn., 133 N. W. 80.

19.——Estoppel.—A party to an illegal contract connot be estopped from setting up the illegality.—In re Canfield, D. C., 190 Fed. 266.

20.——Public Policy.—All contracts which tend to injure the public are void, though no injury results, and there is no actual intent to injure the public.—Noble v. Davison, Ind., 96 N. E. 325.

21. **Corporations**—Accepting Benefits.—Corporations, accepting and using loan, held estopped to assert defense that mortgage was not authorized by the board of directors, or that the person signing as secretary was not the secretary.—Clearwater County State Bank. v. Bagley-Ogema Telephone Co., Minn., 133 N. W. 91.

22.——Comity.—By comity a corporation created by one sovereignty is permitted to make contracts in another and sue thereon.—Model Heating Co. v. Magarity, Del., 81 Atl. 394.

23.——Foreign Corporation.—State courts will not interfere with the internal affairs of a foreign corporation, by attempting to set aside an election of officers or restraining their actions.—Butler v. Standard Milk Flour Co., 131 N. Y. Sup. 451.

24.——Insolvency.—Since the assets of an insolvent corporation are trust funds belonging primarily to its creditors, the administration and distribution of such funds is a matter of general equitable cognizance.—Burton v. R. G. Peters Salt & Lumber Co., C. C., 190 Fed. 262.

25.——Ratification.—A corporation, receiving and retaining benefits of contract, held not entitled to allege its want of authority to enter into the contract.—Northland Produce Co. v. Stephens, Minn., 133 N. W. 93.

26.——Stockholders Liability.—In proceedings to enforce stockholders' liability, the court should order proceedings against all stockholders whose subscrptions were not paid, for an amount sufficient to meet liabilities and costs. —Beddow v. Huston, Wash., 118 Pac. 752.

27.——Transfer of Stock.—Ownership of stock transferred to the transferror's wife becomes complete in her without transfer of the certificates on the corporation's books.—Van Heusen v. Van Heusen Charles Co., 131 N. Y. Sup. 401.

28. **Courts**—Jurisdiction.—If, in an action in the county court upon open account to recover $200.18, an item of $3,72 in the account was barred by limitations, defendant's exception to the court's jurisdiction should have been sustained and the suit dismissed.—Browning v. El Paso Lumber Co., Tex., 140 S. W. 386.

29. **Convenants—Party Wall.**—Where a party wall agreement constitutes a lien for half the cost of the wall on the lot conveyed with covenant against incumbrances, held, that the grantors cannot offset, in diminution of damages, against the amount the grantees have to pay to remove the lien, the value of the easement rights of the lot under the agreement.—Hoffman v. Dickson, Wash., 118 Pac. 737.

30.——Privity.—A remote grantee's right of action upon the breach of a covenant of warranty against the original covenator depends upon privity of estate.—Keys & Marshal Realty Co., v. Trustees of Canton Christian College, 131 N. Y. Sup. 527.

31. **Criminal Law**—Judicial Cognigance.—The Supreme Court knows as a matter of common knowledge that any mechanical device may get out of order, but may be repaired.—State v. Louisville & N. R. Co., Ind., 96 N. E. 340.

32. **Criminal Evidence**—Impeachment.—In a prosecution for murder, evidence of grand jurors as to facts testified to before grand jury in its investigation held admissible for purposes of impeachment only and not to prove the crime.—McElroy v. State, Ark., 140 S. W. 289.

33. **Dismissal and Nonsuit**—Joint Tortfeasors.—In a suit against joint-feasors, plaintiff may take a nonsuit as to such defendants as the evidence does not connect with the tort. —Firor v. Taylor, Md., 81 Atl. 389.

34. **Electricity**—Negligence.—A telegraph or telephone company is not liable for injury to persons coming in contact with its wires unless it was negligent.—Lundy v. Southern Bell Telephone & Telegraph Co., S. C., 72 S. E. 558.

35. **Eminent Domain**—Post Office Sites.—The rule that property devoted to public use cannot be taken for another and inconsistent use without specific legislation does not apply to a proceeding by the general government to condemn a portion of an alley for a post office site.—United States v. City of Tiffin, C. C., 190 Fed. 279.

36. **Equity**—Multiplicity of Suits.—A court of equity, having properly taken jurisdiction of one subject of a contest will dispose of the whole matter in controversy, and thus avoid a multiplicity of suits.—Holden v. Bernstein Mfg. Co., Pa., 81 Att. 428.

37. **Evidence**—Divorce.—In an action for divorce, a hotel register held inadmissible against defendant, in the absence of any claim that she ever saw it or its contents, or heard anything that passed between her alleged companion and the hotel clerk at the time an entry was claim-to have been made.—Mattison v. Mattison, N. Y., 96 N. E. 359.

38.——Domicile.—The burden of proof to establish a change of domicile on the part of a minor is on him.—Hess v. Kimble, N. J., 81 Atl. 363.

39.——Expert Testimony.—Opinion evidence may be given as to the very point the jury are to decide, where such point is within the field of expert testimony, and the opinions offered are based on undisputed facts or assumed facts

warranted by the records.—Cook v. Doud Sons & Co., Wis., 133 N. W. 40.

40.——Judicial Notice.—The Supreme Court cannot take judicial notice that there has been unjust discrimination in excepting small parcels from the residence district of a city as established by ordinance and adding them to the industrial district.—Ex parte Quong Wo, Cal., 118 Pac. 714.

41.——Latent Ambiguity.—Extrinsic evidence is admissible to explain the meaning of the word "home" in a covenant by a grantee to provide a home for a person named.—Day v. Towns, N. H., 81 Atl. 405.

42.——Negative Testimony.—That a witness whose mind was "pretty well occupied" did not hear an electric car signal for a highway crossing does not rebut the motorman's positive testimony that he did signal.—Jordan v. Osborne, Wis., 133 N. W. 32.

43.——Notice to Produce.—Rule requiring notice to produce before secondary evidence will be received held not to apply where pleadings disclose that proof of a document will be necessary.—J. L. Owens Co. v. Bemis, N. D. 133 N. W. 59.

44.——Receipt.—Where a party, alleged to have made a receipt, admitted that he drew the instrument, and that it correctly stated the facts, but denied that he signed it, the absence of the signature was immaterial.—Ross-Higgins Co. v. Rook, Wash., 118 Pac. 744.

45.——Subornation.—In ejectment, testimony as to attempt by defendant to suborn one of plaintiff's witnesses was admissible.—Power v. Grogan, Pa., 81 Atl. 416.

46. **Execution**—Common Law.—At common law, interests in realty are not subject to execution, but can only be reached in equity.—McMillan v. Davenport, Mont., 118 Pac. 756.

47. **Forgery**—Vouchers.—Actual property loss need not be charged or proved, to make out a case under Rev. St. Sec. 5418 of forging vouchers on examination by the Civil Service Commission of the United States.—United States v. Plyler, 32 Sup. Ct. Rep. 6.

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49. **Fraudulent Conveyances**—Reconveyance.—One who conveys property without consideration in order to delay or defraud his creditors cannot compel a reconveyance thereof in equity.—Simis v. Simis, 131 N. Y. Sup. 460.

50. **Frauds, Statute of**—Equity.—In order to prevent the statute of frauds being used to perpetrate fraud, equity sometimes enforces a parol agreement for reconveyance of property, after default in performance regarding the grantee as a trustee ex maleficio.—Simis v. Simis, 131 N. Y. Sup. 460.

51.——Estoppel.—One seeking to charge a lessor of a business for goods actually furnished the lessee cannot assert the invalidity of the lease under the statute of frauds.—Acme Cement Plaster Co. v. Greensboro Wood Fiber Plaster Co., N. C., 72 S. E. 569.

52.——Parol Evidence.—Though a memorandum, to satisfy the statute of frauds, may consist of several writings, parol evidence cannot be made available to supply an essential term of the contract, omitted by the writings.—Evans v. Pelta, 131 N. Y. Sup. 411.

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55.——Dying Declarations.—Before a dying declaration is admissible, proof of the certainty of speedy death and declarant's loss of hope of recovery must be made.—People v. Falletto, N. Y., 96 N. E. 355.

56. **Husband And Wife**—Abandonment.—Though an abandonment has not existed for a year, so as to entitle the wife to a divorce on that ground, she may maintain an action for alimony.—Belcher v. Belcher, Ky., 140 S. W. 309.

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58.——Payment.—Payment of a mortgage from wife to husband cannot be presumed from his failure to sue to foreclose before or after their separation until her death.—Stelts v. Martin, S. D., 72 S. E. 550.

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61.——Nunc pro Tunc Order.—The court may permit the clerk to note on the information and complaint the proper file marks; he not having done so when they were filed.—Brogdon v. State, Tex., 140 S. W. 353.

62. **Infants**—Equity.—The court of chancery has inherent power to change the character of infants' property for their benefit; and one who holds property for infants may not dispose of the same without the sanction of the court.—Day v. Devitt, N. J., 81 Atl. 368.

63. **Injunction**—Mandatory Order.—Mandatory injunction held not generally available to compel destruction of structures prior to determination on the merits.—Ryan v. Weiser Valley Land & Water Co., Idaho, 118 Pac. 769.

64. **Insurance**—Rescission.—Where insured exchanged his old policy for a new one, and at the same time, without his knowledge, signed a certificate of loan upon the new policy, held, that his negligence would not preclude a rescission of the latter contract; it having been in-

duced by fraud.—Green v. Security Mut. Life Ins. Co., Mo., 140 N. W. 325.

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66. **Intoxicating Liquors**—Criminal Intent.—To convict one of a sale of spirituous liquor it is necessary to find that accused sold the liquor with intention that it be used as a beverage, irrespective of the subsequent uses to which the purchaser put it.—State v. Hastings, Del., 81 Atl. 403.

67. **Judgment**—Default.—A judgment by default establishes the liability of the defendant, and defendant may not in a proceeding to assess the damages offer testimony contradicting such liability.—Betz v. P. Welty & Co., Md., 81 Atl. 382.

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70.——Privileged Communication.—A communication is qualifiedly privileged when made in good faith upon any subject in which the communicant has an interest, or with reference to which he has a duty to one having a corresponding interest or duty.—Bohlinger v. Germania Life Ins. Co., Ark., 140 S. W. 257.

71. **Life Estates**—Apportionment of Loss.—Where a loss occurred to a trust fund which belonged to one for life, remainder over, and the property loss consisted of part of the trust fund and partly of indivdual property of the life tenant, held, that the loss must be apportioned between them.—Wallace v. Wallace, S. C., 72 S. E. 553.

72. **Limitation of Actions**—Amendment of Pleadings.—Amendment to pleadings in an action of trover, so as to change the form of action to assumpsit on the common counts, held equivalent to a new action as of the date of the amendment, so that the defense of limitations was available to defendant.—Catanzaro Di Giorgia Co. v. F. W. Stock & Sons, Md., 81 Atl. 385.

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75. **Masters and Servant**—Assumption of Risk.—Unless a servant has actual or constructive knowledge of a danger, he does not assume the risk thereof.—Standard Forging Co. v. Staffel, Ind., 96 N. E. 321.

76.——Concurring Negligence.—Where a third person is injured by the concurring negligence of the servants of two masters, the law does not make fine distinctions in determining which was the proximate cause of the injury.—Firor v. Taylor, Md., 81 Atl. 389.

77.——Evidence.—In an action for an injury to a servant, caused by the breaking of a defective appliance, evidence of previous breaking of the same appliance while in charge of another servant held admissible to show its dangerous character.—Russ v. Harper, N. C., 72 S. E. 570.

78.——Inspection.—Tools and appliances furnished a servant may be so complex as to require inspection as a matter of law, or so simple that no inspection is required, and cases may arise between such extremes wherein the duty to inspect becomes a question for the jury.—Southwestern Portland Cement Co. v. McBrayer, Tex., 140 S. W. 388.

79.——Latent Dangers.—An employer must warn his employe against latent dangers known to the employer, but not known nor properly known to the employe.—Belevicze v. Platt Bros. & Co., Conn., 81 Atl. 339.

80.——Methods of Work.—A master is liable for injury to his servants caused by negligence in directions given or methods of work.—Hamilton v. Hines Bros. Lumber Co., N. C., 72 S. E. 588.

81.——Moving of Trains.—A train should not be moved through a yard in which employes were constantly moving, without a reasonable lookout or signal.—Cincinnati, N. O. & T. P. R. Co. v. Mayfield's Adm'r, Ky., 140 S. W. 310.

82.——Negligent Direction.—A correct rule of law of general application is not stated by the proposition that "the giving of an order which is dangerous to execute is negligence."—Masich v. American Smelting & Refining Co., Mont., 118 Pac. 764.

83.——Proximate Cause.—It was not essential to make the failure to guard cogwheels the proximate cause of an injury that the employer should foresee the identical injury it being bound to anticipate injury to employes.—King v. Inland Steel Co., Ind., 96 N. E. 337.

84. **Mines and Minerals**—Partnership.—Where the members of a statutory mining partnership suspend the operation of the mine, intending to permanently abandon it, the partnership itself is dissolved.—Nielson v. Gross, Cal., 118 Pac. 725.

85.—**Mortgages**—Absolute Deed.—Grantee of a holder of absolute deed given to secure a debt held a mortgagee, whose title cannot be divested without payment of the mortgage.—McMillan v. Davenport, Mont., 118 Pac. 756.

86. **Municipal Corporations**—Defective Sidewalk.—That plaintiff knew that a sidewalk was defective, but nevertheless made use of it, is not conclusive against him as showing contributory negligence.—Maki v. City of Cloquet, Minn., 133 N. W. 80.

87.——Negligence.—That beams by which plaintiff was struck projected from the edge of the wagon on which they were being hauled along a city street did not establish that the wagon was negligently loaded.—Firor v. Taylor, Md., 81 Atl. 389.

88.—Review by Courts.—The action of the city council in enacting police regulations as to the maintenance of certain businesses in certain parts of the city held not subject to review by the courts, unless the regulations clearly invaded personal or property rights under the guise of police regulation.—Ex parte Quong Wo, Cal., 118 Pac. 714.

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90. **Negligence**—Approved Appliances.—The owner and operator of a traction engine is not bound to provide the best and most approved appliance known to him for the prevention of fires along the highway upon which the engine travels.—Cook v. Doud Sons & Co., Wis., 133 N. W. 40.

91.——Proximate Cause.—A test of proximate cause is the probability of injurious consequences to be fairly anticipated from the omission of duty or from a negligent act.—King v. Inland Steel Co., Ind., 96 N. E. 337.

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93.——Dealings Between Partners.—One partner must make a frank and honest disclosure to another of all knowledge from which a sound judgment may be formed as to the value of an interest to be acquired by the former from the latter.—Yost v. Critcher, Va., 72 S. E. 594.

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96. **Principal and Agent**—Estoppel.—The lessor of a business held only liable for goods sold the lessee by persons with whom the lessor had formerly dealt, if its conduct induced the seller to believe that the lessee acted for it in purchasing.—Acme Cement Plaster Co. v. Greensboro Wood Fibre Plaster Co., N. C., 72 S. E. 569.

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Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.

Published by

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Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two volumes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.

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NEEDHAM C. COLLIER, EDITOR-IN-CHIEF.
ALEXANDER H. ROBBINS, MANAGING EDITOR.

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